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By hand

December 13, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., # 222
Washington, D.C. 20554

Re: TCI v. Troy, file no. CSR-4790

Dear Mr. Secretary:

In conversations with the Commission staff last month, we were requested to furnish a detailed legislative history of various sections of the 1996 Act implicated in the above-captioned matter.

A copy of the legislative history responsive to that request is enclosed for filing.

Respectfully submitted,

William Malone

William Malone

Attorney for
PROTEC, Michigan Municipal League, Michigan Townships Association, United States Conference of Mayors, National League of Cities, National Association of Counties, City of Los Angeles, CA, City of Chicago, IL, and Michigan Communities

Enclosure

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

LEGISLATIVE HISTORY OF RIGHTS-OF-WAY PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

SUMMARY

The Telecommunications Act of 1996 (P.L. 104-104) protects local governments' authority to manage their public rights-of-way and to receive fair and reasonable compensation from all telecommunications occupants of those rights-of-way. The specific provisions are in four sections of the 1996 Act that must be read together. They are: section 101 (adding section 253 -- Removal of Barriers to Entry); section 302 (adding section 653 -- Establishment of Open Video Systems); section 303 (amending section 621[b] -- Preemption of Franchising Authority Regulation of Telecommunications Services); and subsection 601(c) -- Federal, State and Local Law. The collective legislative history of these sections is important to understanding the intent of Congress to preserve the authority of local governments under the new legislation.

This legislative history traces the development of these provisions through the Senate passage of S. 652, the Telecommunications Competition and Deregulation Act of 1995, and the House's substitution of H.R. 1555, the Communications Act of 1995, culminating in adoption by both houses of final language in the conference agreement on the bills.

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I. SECTION 253

The text of new section 253 as enacted is as follows:

Sec. 253 REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION.- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

In adopting this language, Congress wanted to create open market entry opportunities into all markets for all telecommunications vendors. Congress wanted to eliminate those state and local public utility licensing and regulatory practices that created legal monopolies or protected incumbent operators from competition. Since the new act presumes that all telecommunications can be competitive, it generally preempts state and local regulations that prohibit, or have the effect of prohibiting, service offerings in subsection (a).

Section 253 contains two "safe harbors" from this general prohibition. The first, in subsection (b), preserves state regulatory authority to impose universal service, public safety and welfare, and consumer protection requirements, as long as they are competitively neutral and consistent with section 254 (universal service). Subsection (d) gives the FCC authority to resolve only subsection (a) and (b) disputes.

The second "safe harbor" is subsection (c), which protects state and local authority to manage and receive compensation for local rights-of-way, if done on a competitively neutral and nondiscriminatory basis and the compensation is publicly disclosed. The language introducing section 253(c) ("Nothing in this section affects...") is strongly reminiscent of that introducing section 2(b) of the 1934 Act ("Nothing in this act shall ... apply ..."),[1] which the Supreme Court held to be an overriding denial of jurisdiction to the Commission. See Louisiana PSC v. FCC, 476 U.S. 355, 370, 374 (1986), a copy of which is attached hereto. Unlike subsection 253(b), the subsection (c) safe harbor does *not* fall within the authority given the FCC under subsection (d). Disputes under subsection 253(c) are, by deliberate decision of Congress, to be settled in the courts.

A. LEGISLATIVE HISTORY OF SECTION 253

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[1] Subsection (b) of section 2 ("Application of Act") was originally added on the floor of the Senate to preserve prior existing non-federal jurisdiction. This is the same "section 2(b)" that the drafters of Sec. 243(e) of H.R. 1555 (part of the "MFS amendment", infra) had thought necessary to expressly override in their attempt to give the FCC jurisdiction over such matters.

SENATE

A draft of S. 652, the **Telecommunications Competition and Deregulation Act of 1995**, was circulated by Senator Larry Pressler (R-SD) on January 31, 1995. A draft Democratic alternative, the Universal Service Telecommunications Act of 1995, was circulated by Senator Hollings (D-SC) on February 14, 1995. Hearings were held on January 9, March 2, and March 21, 1995. No local government representatives were invited to testify.

At the hearings, Senator Kay Bailey Hutchison (R-TX) raised the concern of local governments that their right to manage and receive compensation for use of public rights-of-way by telecommunications providers be preserved.

The Commerce Committee marked up S. 652 on March 23, 1995. The bill as reported included an amendment by Senator Hutchison to new section 254 (which ultimately became section 253) as follows:

> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

S. 652 as reported by the Commerce, Science, and Transportation Committee also contained an amendment in subsection (d) that was not sought by Senator Hutchison, and for which no Senator or committee staff member has publicly claimed responsibility, which gave the FCC the authority to preempt local government exercise of its authority under subsection (c) as well as to preempt state regulatory under subsection (b) and state and local authority under subsection (a). It read:

> (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The language of Senator Hutchison's amendment is virtually identical to that finally enacted in 1996. But the language of the stealth amendment in subsection (d) in 1995 differs significantly from that finally enacted in 1996. The Committee Report (S. Rpt. 104-23) explained the 1995 language by merely repeating it: "Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed. New section 254(d) requires the FCC, after notice and an opportunity for public comment, to preempt enforcement of any state or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsection (a) or other provisions of section 254." (Report, p. 35). The report language is ambiguous and could be read to imply that the focus of FCC preemption is to be barriers to entry.

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c). They were very concerned, however, that the broad provision for FCC preemption under subsection (d) could act to wipe out that authority. The provision for FCC preemption of local right-of-way management and compensation authority in subsection (d) became the focus of local government concerns about S. 652 as it moved to the Senate floor in 1995.

The National League of Cities, United States Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors mounted a major campaign to eliminate the FCC preemption of local right-of-way management and compensation authority. They were supported by the National Governors Association and the National Conference of State Legislatures and by numerous individual cities and counties.

The Senate debated S. 652 on June 7, 8, 9, 12, 13, 14, and 15, 1995. Senators Dirk Kempthorne (R-ID) and Diane Feinstein (D-CA) offered a floor amendment to strike subsection (d) entirely. This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthorne amendment failed on a narrow vote of 44-56 on June 14. The Senate then adopted, by voice vote, a substitute amendment supported by Senators Feinstein and Kempthorne and offered by Senator Slade Gorton (R-WA). The substitute was developed after negotiations between the committee members and Senators

Feinstein and Kempthorne. The Gorton amendment as adopted read as follows:

> (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The purpose of the Gorton amendment was to preclude FCC jurisdiction over disputes involving local government authority over rights-of-way management and compensation, while preserving FCC jurisdiction over other forms of telecommunications business regulation by state or local regulators.

The floor debate over the Kempthorne-Feinstein amendment, together with the debate over the subsequently adopted substitute Gorton amendment, makes clear that the Senate's intent in adopting the Gorton amendment was to completely remove FCC jurisdiction over subsection (c) disputes about whether local government management of compensation requirements for rights-of-way are competitively neutral or nondiscriminatory. In explaining the Feinstein-Kempthorne amendment, Senator Feinstein stated that, for example,

> the FCC lacks the expertise to address the cities' concerns. As I said, if you have a city that is very hilly, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

(Cong. Record for June 12, 1995, at S 8170). Senator Kempthorne also gave an example:

> When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back

> up, new sidewalks, curbs, gutters, paving of the main street. I tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

(Cong. Record for June 12, 1995, at S 8173).

Senator Feinstein also raised some theoretical questions about the effect of not striking subsection (d):

> [I]s a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?

(Cong. Record for June 12, 1995, at S 8173).

In explaining his amendment, which was adopted, Senator Gorton made clear that the amendment was intended to remove from FCC jurisdiction the very kinds of management and compensation requirements that Senators Feinstein and Kempthorne described. He stated:

> [T]he Feinstein amendment... does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. ... I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give... and the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the

jurisdictions which are affected.

(Cong. Record for June 14, 1995, at S 8306). He added:

> [O]nce again, the alternative proposal [the Gorton amendment]... retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.

(Cong. Record for June 14, 1995, at S 8308).[2]

Senator Gorton also made clear that the kind of actions that would remain subject to FCC preemption authority under subsections (a) and (b) were very different: Grants of monopoly or exclusive rights in violation of subsection (a) ("This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider") (Cong. Record for June 14, 1995, at S 8308)); or anticompetitive actions under subsection (b) "when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers" [Cong. Record for June 14, 1995, at S 8308]). "So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances." (Cong. Record June 14, 1995 S 8306) (emphasis added).

[2] This distinction as to venue is consistent with the distinction between Section 402(a) appeals, which may be taken to courts where the party appealing resides, and Section 402(b) appeals concerning federally issued radio licenses and the like, that have been taken to the court of appeals in the District of Columbia since 1927.

HOUSE

House Bill as Introduced

H.R. 1555, The Communications Act of 1995, was introduced on May 3, 1995. Section 101 contained language on rights-of-way management and compensation similar to language in H.R. 4103 which had been passed by the House in the 103rd Congress, as follows:

Section 243. Preemption

(a) REMOVAL OF BARRIERS TO ENTRY.- Except as provided in subsection (b) of this section, no State or local statute, regulation, or other legal requirement shall-- (1) effectively prohibit any carrier or other person from entering the business of providing interstate or intrastate telecommunications services or information service; or (2) effectively prohibit any carrier or other person providing interstate or intrastate telecommunications services or information services from exercising the access and interconnection rights provided under this part.

(b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of State or local officials to impose, on a nondiscriminatory basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, ensure that a providers's business practices are consistent with consumer protection laws and regulations, and ensure just and reasonable rates, provided that such requirements do not effectively prohibit any carrier or person from providing interstate or intrastate telecommunications services or information services.

(c) CONSTRUCTION PERMITS.- Subsection (a) shall not be construed to prohibit a local government from requiring a person or carrier to obtain ordinary and usual construction or similar permits for its operations if-- (1) such permit is required without regard to the nature of the business; and (2) requiring such permit does not effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service.

(d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

(e) PARITY OF FRANCHISE AND OTHER CHARGES.- Notwithstanding section

> 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

The chief proponent of subsections (c) and (e) of section 243 was Congressman Dan Schaefer (R-CO). The language in subsections (c) and (e) was generally referred to as the "MFS amendment," because that company had successfully sought inclusion of similar language in H.R. 4103 in the 103rd Congress.

Hearings were held on H.R. 1555 on May 10, 11, and 12, 1995. Local government representatives testified on May 11 and strongly opposed the language in new section 243 -- particularly that in subsections (c) and (e).

The Telecommunications and Finance Subcommittee marked up H.R. 1555 on May 17, 1995. No amendments were made to section 243 at the markup and the Subcommittee reported the bill with the same language in section 243 as introduced.

The full Commerce Committee marked up H.R. 1555 on May 24 and 25, 1995. At the full Commerce Committee mark on May 25, Congressman Bart Stupak (D-MI) raised the concern of local governments about the language in section 243. Congressman Stupak offered and then withdrew an amendment to section 243 that was similar to the language adopted by the Senate Committee but without the pre-Gorton amendment provision for FCC preemption of local government right-of-way management and compensation authority. The language of the proposed Stupak amendment was as follows:

> STRIKE NEW SECTION 243 (a), (b), (c), and (e) beginning on Page 12, Line 6, AND INSERT THE FOLLOWING NEW SECTION: REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.
>
> (b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Congressman Stupak withdrew his amendment amid assurances by the committee leadership that efforts would be made before the bill was reported to the floor to work out language that would respond to the concerns of local governments over the limiting effect of subsections (c) and (e) concerning construction permits and parity language. Congressman Joe Barton (R-TX) took the lead on the majority side on behalf of local governments in this effort. Efforts were made in talks and negotiations with the chief proponent of the section 243 language, Congressman Schaefer, to reach agreement. Among the alternatives considered were a proposal to explicitly invalidate existing below-market telephone franchises that hindered the application of reasonable right-of-way compensation fees and another proposal to authorize fees at a level not to exceed eight percent. All versions offered by Congressman Schaefer, however, continued to include the objectionable parity language of paragraph (e) and were rejected by Congressmen Stupak and Barton, who determined to take the matter to the full House.

The Committee Report on H.R. 1555, filed July 24, 1995 (H.Rpt. 104-204) describes the relevant portions of section 243 as follows:

> Section 243(c) makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way. This provision clarifies that local control over construction on public rights-of-way is not disturbed.... Section 243(e) prohibits a local government from imposing a franchise fee or its equivalent for access to public rights-of-way in any manner that discriminates among providers of telecommunications services (including the LEC). The purpose of this provision is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from one provider is one means of creating this parity. It is not the intent of the Committee to deny local governments their authority to impose franchise fees, but rather simply to require such fees be imposed in a non-discriminatory manner. This paragraph is not intended to affect local governments' franchise powers under Title VI of the Communications Act. Local governments can remedy any situation in which a fee structure violates this section by expanding the application of their fees to all providers of telecommunications services including the LECs. Moreover, this section does not invalidate any general imposition that does not distinguish between or

> among providers of telecommunications services, nor does it apply to any lawfully imposed tax.

(Report pp. 75-76).

The House debated H.R. 1555 on August 3 and 4, 1995. The manager's amendment, adopted by the House, included a revision to section 243 in an attempt to head off adoption of a Barton-Stupak amendment. The manager's amendment revised subsection (b) by striking the words "or local", and it inserted a new subsection (c)(2) as follows:

> MANAGEMENT OF RIGHTS OF WAY.- Nothing in subsection (a) shall affect the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

This language was the same as part of the Hutchison amendment adopted by the Senate Committee. It left in place, however, the objectionable parity language of the Schaefer-MFS provision in subsection (e).[3]

The Barton-Stupak amendment was one of very few amendments permitted by the House Rules Committee under the rule governing debate on H.R. 1555. The Barton-Stupak amendment proposed to strike <u>all</u> of section 243 as reported by the House Committee and to substitute new language. The new language was essentially the same as that of the Senate Committee, with three qualifications: (1) it would extend the safe harbor of subsection (b) to

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[3] Quoted *ante* at 11-12.

local as well as State governments; (2) it would apply the safe harbor in subsection (c) to the entire Act, not just that section; and (3) it would eliminate any reference to FCC preemption jurisdiction over State or local actions.

The Barton-Stupak amendment read as follows:

> Section 243. REMOVAL OF BARRIERS TO ENTRY
>
> (a) IN GENERAL.- No State or local statute, regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.
>
> (b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of State or local officials to impose, on a competitively neutral basis and consistent with section 247 (relating to universal service), requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

In his remarks on the House floor during the debate on H.R. 1555, Congressman Stupak particularly stressed that the Barton-Stupak amendment would delete the requirement for parity between the LEC and other providers, and instead could allow different compensation from different providers for use of the rights-of-way. He stated:

> Local governments must be able to distinguish between different telecommunications providers... The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip of our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize the telecommunications companies... .

(Cong. Record for August 4, 1995, at H 8460).

Congressman Barton stated a similar intent:

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that rights of way.... The Chairman's [Manager's] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has no business telling State and local governments how to price access to their right-of-way.

(Cong. Record for August 4, 1995, at H 8460).

Over the vigorous opposition of Rep. Schaefer, the author of the "MFS amendment," the House debated and adopted the Barton-Stupak amendment by an overwhelming vote of 338-86. In arguing vigorously (and unsuccessfully) against the Barton-Stupak amendment, Congressman Schaefer and others made many of the same arguments that the telecommunications industry is making today in petitions to the FCC such as TCI v. Troy and PCS Western. For example, Congressman Schaefer claimed that acceptance of the Barton-Stupak amendment "is going to allow the local governments to slow down and even derail the movement to level competition." (Cong. Record for August 4, 1995, at H 8460). Congressman Fields claimed that cities are allowed to charge incumbent telephone company little or nothing because of "a century-old charter ... which may even predate incorporation of the city itself. ... [T]hey threaten to Balkanize the development of our national telecommunications infrastructure. ..." "When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive...." "What does control of rights-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing." (Cong. Record for August 4, 1995, at H 8461).

After hearing Congressman Schaefer's arguments, the House rejected them and adopted the Barton-Stupak amendment by a vote of 338-86. By adopting Barton-Stupak, the House strongly rejected the Schaefer-Fields arguments for the Schaefer parity language. By adopting Barton-Stupak, which was the same as the Senate in reference to fair and reasonable compensation for right-of-way use, the House overwhelmingly endorsed the proposition that differential compensation based on market valuation is not discriminatory and that local governments are the appropriate body to make such decisions.

B. CONFERENCE AGREEMENT

Despite the overwhelming House vote for the Barton-Stupak amendment, the close vote on Feinstein-Kempthorne, and the unanimous adoption of the Gorton amendment in the Senate, the debate over rights-of-way management and compensation language continued into the conference process. The problem was largely fueled by certain House Committee staff who apparently did not accept, or were instructed not to accept, the clear will and intent of the two houses of Congress. The final conference agreement on S. 652/H.R. 1555 as adopted by both houses, however, adopts the Senate language of section 253. The final law thus preserves the safe harbor protecting the authority of local governments over rights-of-way management and compensation and preserves the clear intent of Congress that the FCC is to have no jurisdiction over subsection (c) disputes, leaving them to the courts. It also preserves the recognition that fair and reasonable does not mean identical.

C. MEANING OF SECTION 253

The language of section 253 is consistent with treating compensation for use of public rights-of-way as rent. And the language is broad enough to encompass all forms of compensation -- in-kind as well as cash. Nor must the compensation be exactly the same for all users. Just as office building tenants or apartment building tenants -- even tenants in the same line of business -- may pay different rents, rights-of-way rental rates will depend on the nature and scope of the space occupied, the services provided to the tenant, the length of the lease, the market conditions at the time the lease was signed, and other relevant reasonable distinctions.

Section 253 creates a two-step hurdle for any telecommunications provider seeking to challenge a right-of-way management-compensation requirement imposed by a local government. The first hurdle is to prove the local government has not acted "on a competitively neutral and nondiscriminatory basis." The local government enjoys a safe harbor if the local rights-of-way requirement is consistent with (c). In other words, the local government may manage the public rights-of-way and may require fair and reasonable compensation even if its actions would otherwise be considered to be a barrier to entry under subsection (a). Moreover, only a court -- not the FCC -- has jurisdiction to consider whether a particular local right-of-way management or compensation requirement falls within the safe harbor of subsection (c).

Even if the telecommunications provider successfully passes this first hurdle, the statute says that a local government regulation is still not preempted unless it falls within subsection (a) -- that is, it "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide" any telecommunications service. Thus, even if a right-of-way management or compensation requirement is discriminatory or not competitively neutral under subsection (c), a company that objects to the requirement must also prove that the requirement actually "prohibits" or has "the effect of prohibiting" the service. While the FCC has concurrent jurisdiction to consider questions under subsection (a), an assertion by a local government of a defense under subsection (c) removes the matter from FCC jurisdiction unless and until a court finds the subsection (c) defense invalid. See remarks of Senator Gorton at S 8306, 8308 (June 14, 1995), quoted above.

Section 253(a) generally prohibits legal restrictions on new competitive entry to any telecommunications business. But subsections (b) and (c) in section 253 limit the reach of the section 253(a) prohibition. They clarify that subsection (a) only refers to the authority to license entry into the business. Other normal activities of telecommunications service providers are still subject to reasonable state and local regulation for other purposes. Of particular note, section 253(c) makes clear that state and local governments retain their authority both to (1) manage the public rights-of-way; and (2) require fair and reasonable compensation from telecommunications providers for the use of public rights-of-way.

In other words, the legislation's prohibition on "barriers to entry" does not interfere with local governments' right-of-way management or compensation authority, so long as that authority is exercised in a nondiscriminatory and competitively neutral manner. Language in the new law and accompanying legislative reports makes clear that all cable television and telecommunications providers are subject to this overriding principle of local control of the public rights-of-way.

II. SECTIONS 302 AND 303

Section 302 of the Telecommunications Act of 1996 adds a new section 653 to the Communications Act of 1934, which is related to provision of cable television services by telephone companies through Open Video Systems. The section states:

(c) REDUCED REGULATORY BURDENS FOR OPEN VIDEO SYSTEMS.-

(1) IN GENERAL.-Any provision that applies to a cable operator under-

(A) sections 613 (other than subsection (a) thereof), 616, 623(f), 628, 631, and 634 of this title, shall apply,

(B) sections 611, 614, and 615 of this title, and section 325 of title III, shall apply in accordance with the regulations prescribed under paragraph (2), and

(C) sections 612 and 617, and parts III and IV (other than sections 623(f), 628, 631, and 634), of this title shall not apply,

to any operator of an open video system for which the Commission has approved a certification under this section.

(2) IMPLEMENTATION.-

(A) COMMISSION ACTION.-In the rulemaking proceeding to prescribe the regulations required by subsection (b)(1), the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection. The Commission shall complete all action (including any reconsideration) to prescribe such regulations no later than 6 months after the date of enactment of the Telecommunications Act of 1996.

(B) FEES.-An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area, as determined in accordance with regulations prescribed by the Commission. An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee under this subparagraph as a separate item on the bill.

(3) REGULATORY STREAMLINING.- With respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of title II.

Section 303 (Preemption of Franchising Authority Regulation of Telecommunications Services) as adopted in the 1996 Act is as follows:

(a) PROVISION OF TELECOMMUNICATIONS SERVICES BY A CABLE OPERATOR.- Section 621(b) (47 U.S.C. 541(b)) is amended by adding at the end thereof the following new paragraph:

'(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services-

'(i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services: and

'(ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.

'(B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

'(C) A franchising authority may not order a cable operator or affiliate thereof-

(i) to discontinue the provision of a telecommunications service; or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by section 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(b) FRANCHISE FEES.-Section 622(b) (47 U.S.C. 542(b)) is amended by inserting 'to provide cable services' immediately before the period at the end of the first sentence thereof.

Sections 302 and 303 are complementary. Section 302 removes prohibitions previously in federal law on the provision of video programming by telephone companies directly to subscribers in their own service areas. Section 303 preempts Title VI cable franchising authority regulation of telecommunications services through a cable franchise. Both sections also make clear that when telephone companies provide video, either as cable operators or as operators of an open video system, they are subject to the same rights-of-way and compensation authority of local governments as other cable operators. Conversely, when cable companies provide telecommunications services, they are subject to the same rights-of-way and compensation authority of local governments as other telecommunications providers.

The Telecommunications Act of 1996 treats video services differently than other telecommunications services. But the Act does give cable operators the same rights of entry into telecommunications services as non-video telecommunications providers. Section 303 applies the same principle as section 253 to cable operator provision of telecommunications services: no state or local regulation may prohibit a cable television operator from providing telecommunications services. However, a local government can still require that a cable operator obtain a local cable franchise before entering the cable television business. But that same cable franchise cannot prohibit the cable operator from providing telephone service or from going into the telephone business.

The 1996 Act does, however, explicitly preserve the prior authority of local governments under Sections 611 and 612 of the Cable Act to require cable operators provide public, educational and government (PEG) access channels, plus facilities such as studio space and equipment related to PEG access channel use, as well as "institutional networks" from cable operators. (Institutional networks are dedicated transmission capacity on a cable system that permits the local government to transmit voice, video and data on a closed network not generally available to all the cable system's subscribers [Sec. 611(f)].) The Act explicitly permits the local government to enforce these service requirements as contractual promises when contained in the cable franchise.

Local governments persuaded Congress to amend Section 303 extensively. The amendments were added to the legislation on the last day the bill was in the conference committee to clarify that cable television operators who decide to provide telecommunications services may be subject to the same right-of-way requirements as other non-cable telecommunications providers. A cable franchise cannot prohibit entry into telecommunications. But neither does it convey the right to use the rights-of-way for telecommunications services without separate compensation therefor. To the extent a cable operator provides telecommunications services, it must comply with any local government rights-of-way management and compensation arrangement that is consistent with section 253.

A. LEGISLATIVE HISTORY OF SECTION 303

SENATE

S. 652 as reported by the Commerce, Science and Transportation Committee on March 23, 1995, S. 652 included the following language in section 201(b):

> (b) PROVISION OF TELECOMMUNICATIONS SERVICES BY A CABLE OPERATOR.-
>
> (1) JURISDICTION OF FRANCHISING AUTHORITY.- Section 621(b) (47 U.S.C. 541(b)) is amended by adding at the end thereof the following new paragraph:
>
> '(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services--
> (i) such cable operator or affiliate shall not be required to obtain a franchise under this title; and
> '(ii) the provisions of this title shall not apply to such cable operator or

affiliate.
'(B) A franchising authority may not require a cable operator or affiliate thereof to discontinue the provision of a telecommunications service.
'(C) A franchising authority may not require a cable operator to provide any telecommunications service or facilities as a condition of the initial grant of a franchise, franchise renewal, or transfer of a franchise.'.

The Committee report (S. Rpt. 104-23) on S. 652 explained this provision as follows:

Subsection 201(b) of the bill establishes the principles applicable to the provision of telecommunications by a cable operator. Paragraph (1) of this subsection adds a new paragraph 3(A) to section 621(b) the 1934 Act, which sets forth the jurisdiction of and limitations on franchising authorities over cable operators engaged in the provisions of telecommunications services. Specifically, a cable operator or affiliate engaged in the provision of telecommunications services is not required to obtain a franchise under Title VI of the 1934 Act, nor do the provisions of Title VI apply to a cable operator to the extent they are engaged in the provision of telecommunications services. Franchising authorities are prohibited from ordering a cable operator or affiliate to discontinue the provision of telecommunications services, requiring cable operators to obtain a franchise to provide telecommunications services, or requiring a cable operator to provide telecommunications services or facilities as a condition of an initial grant of franchise, franchise renewal, or transfer of a franchise.

The Report then added a key additional explanation: "However, the Committee intends that telecommunications services provided by a cable operator shall be subject to the authority of a local government to manage its public rights of way in a non-discriminatory manner and to charge fair and reasonable fees for its use." (S. Rpt. 104-23, pp. 35-36) This explicitly states the Committee intent to make cable operators who provide telecommunications subject to the local government right-of-way management and compensation authority in section 254(c) of the Committee bill, as amended by Senator Hutchison.

This section was changed in one important way in the final Senate adopted version of S. 652. At the end of both subsections 3(A)(i) and 3(A)(ii) the words "for the provision of telecommunications services" were added, so that these sections then read:

> (3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services--
> (i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services; and
> (ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.
> (B) A franchising authority may not require a cable operator or affiliate thereof to discontinue the provision of a telecommunications service.
> (C) A franchising authority may not require a cable operator to provide any telecommunications service or facilities as a condition of the initial grant of a franchise, franchise renewal, or transfer of a franchise.'.

The effect of this additional language, which was included in the final Act, was to further clarify that the prohibition only referred to a Title VI franchise for non-cable services. There was no debate of section 201(b) or the amendment to it on the Senate floor.

HOUSE

H.R. 1555, the Communications Act of 1995, contained the following as introduced:

> SEC. 106. PREEMPTION OF FRANCHISING AUTHORITY REGULATION OF TELECOMMUNICATIONS SERVICES.
>
> (a) TELECOMMUNICATIONS SERVICES- Section 621(b) (47 U.S.C. 541(b)) is amended by adding at the end thereof the following new paragraph:
>
> '(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services--

> '(i) such cable operator or affiliate shall not be required to obtain a franchise under this title; and
> '(ii) the provisions of this title shall not apply to such cable operator or affiliate.
> '(B) A franchising authority may not impose any requirement that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.
> '(C) A franchising authority may not order a cable operator or affiliate thereof–
> '(i) to discontinue the provision of a telecommunications service, or
> '(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.
> '(D) A franchising authority may not require a cable operator to provide any telecommunications service or facilities as a condition of the initial grant of a franchise or a franchise renewal.'.

The Telecommunications and Finance Subcommittee marked up H.R. 1555 on May 17, 1995. The full Commerce Committee marked up H.R. 1555 on May 24 and 25, 1995. Aside from the insertion of the words "of the Act" after the words section 621(b) in the first sentence, neither the Subcommittee nor the Committee made any change in section 106 from bill as introduced.

The Committee Report on H.R. 1555, filed July 24, 1995 (H. Rpt. 104-204) describes the intent of section 106 as follows:

> The Committee intends that this section precludes a local government from imposing a franchise obligation on provision of telecommunications services, but this section does not otherwise limit the right of local governments to impose fees and other charges pursuant to section 201(c)(3)(D), or limit the rights of local governments with respect to franchise obligations applying to cable service.... [H. Rpt. 104-204, Part I, p.93]

> The intent of this provision is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity. The Committee is aware that some local franchising authorities have attempted to expand their authority over the provision of cable service to include telecommunications services offered by cable operators. Since 1934, the regulation of interstate and foreign telecommunications services has been reserved to the Commission; the State regulatory agencies have regulated intrastate services. It is the Committee's intention that when an entity, whether a cable operator or some other entity, enters the telephone exchange business, such entity should be subject to the appropriate regulations of Federal or State regulators. [H. Rpt. 104-204, Part I, p.93].
>
> The Committee does not intend that section 106(b) be used by cable operators to escape their obligations under Title VI qua cable operators. For that reason, paragraph 3(A) begins, "To the extent that a cable operator is engaged in the provision of cable services ***." This language makes clear that a cable operator does not escape from all of its Title VI obligations, including franchise fees, simply because it begins to offer a telecommunications service other than a cable service. Rather, the force of paragraph (3) only falls on that portion of the cable operator's business related to telecommunications services.
>
> Finally, the Committee does not intend to exempt a cable operator's intrastate telecommunications services or facilities from regulation by a State regulatory body. [H. Rpt. 104-204, Part I, p.93-94]

There were two changes to section 106 as adopted by the full House. One was technical -- the provision became section 107. The other was substantive. This change inserted the words "Except as otherwise permitted by sections 611 and 612," at the beginning of subsection (D) and inserted the phrase, "other than intragovernmental telecommunications," after the word facilities in that same section. The version as passed by the full House then read:

> (D) Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications

> service or facilities, other than intragovernmental telecommunications, as a condition of the initial grant of a franchise or a franchise renewal.

This amendment was amendment item 25 of the Manager's amendment (Cong. Record for August 4, 1995, at H 8447). There was no discussion of this item on the floor of the House. The amendment was made in response to lobbying by local government officials and local program producers who were concerned that the Committee language might have jeopardized the provision of institutional networks and other two-way intragovernmental services that are included in many cable franchises by classifying them as "telecommunications." The intent of the amendment was to make clear that local government authority to require these services as part of a cable franchise was not affected by the language in section 106.

B. CONFERENCE AGREEMENT

Section 201(b) of S. 651 and section 107 of H.R. 1555 were combined into section 303 of the Conference Agreement. Local governments were very concerned that the language in this section be as clear as possible about the retention of local government authority over rights-of-way and compensation for their use by all telecommunications providers, including cable operators that choose to offer non-video telecommunications services. Local governments were also concerned that the intent of the House and Senate be very clear that the prohibition on requiring telecommunications as part of a franchise only refer to cable franchises under Title VI of the Communications Act, and that local governments retain the authority to require or use non-cable franchises as the means of managing telecommunications providers' use and payment for rights-of-way. The sponsors of the Barton-Stupak amendment and the sponsors of the Feinstein-Kempthorne amendment were likewise concerned that a misreading of the prohibition on "franchising" for telecommunications services provided by cable operators not operate to undermine the protection of local government authority over rights-of-way compensation by all telecommunications providers that their amendments had achieved in section 253. They were so concerned that they threatened to use the newly-enacted Unfunded Mandates Reform Act, P.L. 104-4, to stop the bill if the language in what became Sections 302 and 303 was not clarified to fully protect local government rights-of-way management and compensation authority over all telecommunications service providers.

Following an intense effort in the last stages of the conference, section 303 in the conference agreement was redrafted so that the limiting phrase "under this title" was added in the one place where it did not already appear -- to subsection (B) from H.R. 1555, referring to Title VI, the Cable Act. The effect of this amendment was seemingly small but in reality very significant. This language limits the effect of Section 303 to Title VI of the Communications Act, the federal Cable Act. The language means, as in the other subsections of the Cable Act amendments, that the prohibition on a cable television franchising authority imposing "any requirement... that has the purpose or effect of prohibiting, limiting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof" only applies to cable franchises issued pursuant to the federal Cable Act and not to franchises issued under other authority. The insertion of the words "under this Title" in subsection (B) makes clear that telecommunications franchises or other forms of agreements or requirements, under authority other than the Cable Act (Title VI of the Communications Act), were not prohibited by the 1996 Act's amendment to the Communications Act. The language in section 601(c) (see below) also explicitly preserves all State law unless it is explicitly preempted. As a result, the final language of section 303 does not affect franchising of telecommunications services by local governments.

The conference report also added this important statement: "The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights of way and charge fair and reasonable fees." (H. Rpt. 104-458, p. 180). Thus, the reference is again made to the protection of local government authority in section 253.

C. LEGISLATIVE HISTORY OF SECTION 302

Section 302 of the Telecommunications Act, which provides for open video systems, sprang new-born in the conference agreement. It replaced provisions in H.R. 1555 and S. 652 that were based on a video dialtone model of entry by telephone companies into the provision of video programming to subscribers. There is no real legislative history other than the conference report. To the extent that there are some similarities to the video dialtone or video platform provisions of the two bills, there is some additional guidance as to intent. Local governments were again concerned about protecting the rights-of-way management and compensation authority of section 253 when they saw drafts of the OVS provisions.

As a result of their intense lobbying and the insistence of the Barton-Stupak and Kempthorne-Feinstein sponsors, language was included in the conference report in the section on OVS again referencing section 253 in the same language as in section 303: "The Conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in an nondiscriminatory and competitively neutral manner." (H. Rpt. 104-458, p. 178). The Conference Report also clarified compensation: "... open video systems may be subject to fees imposed by local franchising authorities, but such fees are in lieu of fees required under section 622 [cable franchise fees]." The conferees also made open video systems subject to the same kind of in-kind compensation that can be required of cable operators under section 611 (public, educational and government access and institutional networks), but pursuant to FCC regulations.

III. SECTION 601(c)

Section 601(c) sets the overall framework for construing the meaning of the Act and the intent of Congress in regard to state and local authority. Section 601(c) provides:

(c) FEDERAL, STATE AND LOCAL LAW.-

(1) NO IMPLIED EFFECT.- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

A. LEGISLATIVE HISTORY

SENATE

S. 652 as reported by the Senate Commerce, Science, and Transportation Committee contained a tax savings clause as part of section 201, Removal of Entry Barriers. The Committee language, in section 201(c), read:

> (c) STATE AND LOCAL TAX LAWS.- Except as provided in section 202 [limitation of local taxation of DBS], nothing in this Act (or in the Communications Act of 1934 as amended by this Act) shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation that is consistent with the requirements of the Constitution of the United States, this Act, the Communications Act of 1934, or any other applicable Federal law.

The committee report does not elaborate on the intent of this section, but merely repeats what it says. (S. Rpt 104-23, p. 36). The provision was not changed when the full Senate adopted S. 652.

The Senate-adopted language had many potential exceptions in its requirement that state and local law be "consistent" with a wide range of specified and unspecified federal laws in order to be protected.

HOUSE

The corresponding House section 401(c) did not have these exceptions.

H.R. 1555 as introduced contained in section 401(c) a broader savings clause that was not limited to tax laws:

> (c) FEDERAL, STATE, AND LOCAL LAW.- (1) Except as provided in paragraph (2), parts II and III of title II of the Communications Act of 1934 shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such part. (2) Parts II and III of title II of the Communications Act of 1934 shall supersede State and local law to he extent that such law would impair or prevent the operation of such part.

This language remained the same through Subcommittee and full Committee mark up. The House Committee report explains that "This section also contains a savings clause for State and local law, except "to the extent such law would impair or prevent the operation of this Act." (H. Rpt. 104-204, Part I, p. 124).

The Manager's amendment to H.R. 1555, adopted on August 4, 1995, amended subparagraph 401(c)(2) to read as follows:

> (2) STATE TAX SAVINGS PROVISION.- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 243(e) and section 622 of the Communications Act of 1934 and section 402 [the DBS tax provision] of this Act.

This change made the savings provision in the House bill even broader, by dropping the limitation to "Parts II and III of Title II of the Communications Act" and adopting instead savings language that made clear that nothing in the entire Telecommunications Act of 1996 or the amendments made by the Act may be interpreted to affect State or local law unless specifically and expressly so provided.

The conferees rejected the Senate language in favor of both the general savings and the specific tax savings provisions of the House language. The conference report states that "[t]he conferee agreement adopts the House provision stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides." The Conference Report makes the Congress' intent clear: "This provision prevents affected parties from asserting that the bill impliedly preempts other laws." (Conference Report 104-258, p. 201) (emphasis added).

Subsection 601(c)(2), STATE TAX SAVINGS PROVISION, reinforces the broad sweep of general protection for Federal, State, and local law in section 601(c)(1). There are only three narrow exceptions to this broad preservation of state and local taxing authority. The reference to section 622 of the Communications Act merely clarifies that existing law, which sets a cap on the cable franchise fees, remains in effect. In addition to a franchise fee, a state or local government may impose any other tax, fee or assessment on a cable operator, as long as the tax is of "general applicability" and is not unduly discriminatory against the cable operator (Section 622 [g][2][A]).

A tax, fee or assessment of general applicability is one that applies to a broad category of services, products or activities and does not single out a cable operator for unique or different taxation. General sales and excise taxes, taxes that are applied to all utilities, personal property taxes, real estate taxes, gross receipts taxes on businesses operating in a community, and street opening permit and inspection fees are examples of taxes and fees of general applicability that may be charged to cable operators in addition to a cable franchise fee under section 622. Revenues that a cable operator receives from non-cable service can still be recovered through a separate right-of-way occupancy fee applicable to telecommunications providers, including the cable operator.

CONCLUSION

As the Telecommunications Act of 1996 passed through the various stages of the legislative process en route to its final enactment it became clear that in these four provisions the Congress finally arrived at a coherent stance of (1) preserving local prerogatives in rights-of-way management and compensation, and (2) having any disputes with respect thereto resolved in the courts rather than at the Commission in Washington, D.C. That such preservation was deliberated at many stages and that prior-existing local powers were consistently preserved, demonstrates that the 1996 Act embodies a deliberate policy decision by Congress that the Commission should not attempt to disregard.

Attachment